THE NEW JERSEY PRACTICE ACT OF 1912.*

IN 1912, the legislature of New Jersey enacted a supplement to the then existing Practice Act, which made radical changes in the common-law procedure as it had prevailed in that state. The short title of the supplement is "The Practice Act (1912)." It introduced three principles of prime importance into that procedure; they are: (1) the principle of judicial control over procedure, (2) minimum delay on points of procedure, and (3) settlement of the whole controversy in one suit so far as justly practicable.

JUDICIAL CONTROL OVER PROCEDURE.

The principle of judicial control over procedure is the most conspicuous feature in the system. Most details are regulated by rules of court; the act itself contains only thirty-four sections, which, for the most part, do not deal with details. About eighty rules are annexed, which it is provided shall be deemed to be rules of court, and shall be subject to revision and amendment by the Supreme Court as may be found to be expedient. The court may suspend any rule in any particular case in which its enforcement would work injustice, and, throughout the progress of a suit, pretty much every step is taken subject to the control of the court. Moreover, the court is given power to supersede, by rules, prior statutory or traditional regulations of procedure.

In the hands of judges entitled to the confidence of the bar and of the public, this control over the judicial machinery makes it an instrument for the administration of justice sufficiently flexible to prevent its perversion to unreasonable delay, or to the miscarriage of justice. The flexibility distinguishes the proce-

Editorial Note: This discussion of the principles involved in the New Jersey Practice Act should be of especial interest, because of the satisfactory results of this new procedure since put into operation in that state, and because the question of reform of procedure is a live and important one at present in many of the states, notably in Virginia.

dure from that regulated by code; for code procedure, being statutory, is relatively inflexible; the suitor may suffer an unreasonable penalty in delay or defeat as a result of an accidental slip, from which, under the New Jersey procedure, the court could relieve him upon just terms.

Of course, neither the courts nor the legislature can dispense with constitutional safeguards, such as the right of trial by jury, and the right to "due process of law."

Minimum Delay upon Points of Procedure.

The principle of minimum delay upon points of procedure is applied in numerous provisions. Demurrers and dilatory pleas are abolished, and a summary disposition on motion is substituted. All objections upon points of pleading and practice must also be made upon motion. No appeals to another court are allowed until after final judgment, and reversal on appeal is forbidden "unless after examination of the whole case it shall appear that the error injuriously affected the substantial rights of a party." The effect of these provisions is that every point of procedure is determined, with minimum delay, upon motion; the case then proceeds to final judgment upon the merits, and if justice has been done in the final result, the judgment stands, notwithstanding the decision upon the point of procedure may have been erroneous. The courts have (wisely, I think) refrained from attempting to define the term "substantial rights," though they have frequently declined to reverse because the error complained of did not impair such a right within the meaning of the act.

It may be suggested that this provision adds nothing to the power which appellate tribunals exercised at common law under the "harmless error" doctrine. But I think the provision goes much further. An order erroneously changing the venue in a local action is, at common law, ground for reversal of the final judgment; but, under the New Jersey procedure, if the trial court had jurisdiction, and if the trial was full and fair and no actual disadvantage had resulted from the order, it is probable that no court would decide that a "substantial right" had been impaired.

Settlement of Whole Controversy in One Suit.

The principle of settling the whole controversy in one suit is applied in the enlarged right to join parties and causes of action, and in the latitude allowed in making counterclaims, but these steps are always under the court's control. These subjects will be referred to presently in mentioning specific changes made by the new procedure. Limitations contained in the State Constitution prevent the application of this principle to certain classes of cases which present, in one suit, a legal and a separate equitable controversy. The New Jersey court of last resort has decided that in a certain class of such cases jurisdiction is wanting in the common-law courts to deal with the equitable rights, and is also wanting in the equity court to deal with the common-law rights. Such cases are sometimes, of necessity, split into two lawsuits, though, at bottom, only a single controversy exists. An illustration is a case in which a bill of equity is filed for an injunction to restrain a defendant from using an alleged right of way when the defendant claims the right by prescription. In such case, the injunctive relief cannot be granted by the common-law courts, while the question whether there is a prescriptive right of way is a jury question, of which equity has no jurisdiction and which, therefore, must be decided in a common-law court. A recent supplement to the New Jersey Chancery Act (which took effect last July) is designed to relieve this condition as far as practicable under the Constitution, by providing that in such cases the court of equity shall retain the cause, sending to the lower court the jury question for trial upon an issue to be made.

Changes in Old Procedure.

Among the important changes made in the old procedure are the following:

Forms of Action.

The new rules prescribe a single form of action, called "an action at law," in place of the many forms of common-law action which previously existed. The action is begun by a writ of summons, to which the complaint is attached. In the latter,

plaintiff is required to state concisely, in numbered paragraphs, the facts constituting his cause of action, and the damages or recovery which he demands.

Parties.

The common-law conception of parties upon each side, as a unit, is quite abandoned. The plaintiffs are those claiming an interest in the subject of the action and in obtaining the judgment; the defendants are those alleged to claim an interest in the controversy adverse to plaintiffs, or any one whom it is necessary to make a party for the complete determination of any question involved therein. If plaintiff is uncertain which of two persons is liable to him, he may make both defendants, stating the facts which show his right to recovery, and claiming judgment against the one or the other in the alternative. Persons interested in separate causes of action may join as plaintiffs, or be joined as defendants, but only when the causes of action have a common question of law or fact and arise out of the same transaction or series of transactions. The court, however, may strike out any cause of action which cannot be conveniently tried with another with which it is joined, or may order separate trials. The representatives of a deceased co-contractor may join as plaintiffs or be joined as defendants with the survivor. Parties may be dropped or added under the court's control, at any stage of the case. All of these provisions respecting parties are, however, permissive only; the plaintiff may sue according to the old rules, if he chooses to do so, but the defeat of the action for non-joinder or misjoinder of parties is prohibited.

In order that the judgment may deal accurately with such diversity in the rights of the parties, it is provided that the court may "determine the ultimate rights of the parties on each side as between themselves," and judgment may be entered "in such form as may be required by the nature of the case."

Joinder of Causes of Action.

With some stated exceptions, the plaintiff may join any causes of action, subject to the power of the court to order sep-

arate trials or to strike out any of them because they cannot be conveniently tried together; and so a defendant, subject to the same judicial control, may counterclaim upon any cause of action, and for that purpose, he may bring in third parties.

Pleadings.

These are placed entirely under the control of the court, both in respect to form and time of filing. The rules require them to contain in numbered paragraphs, a "plain and concise statement of the facts on which the pleader relies (and no others), but not of the evidence by which they are to be proved." Objections to form, or on the ground of insufficiency, are dealt with summarily on motion, and fuller statements of facts or "bills of particulars" may be ordered. Any pleading may be struck out on motion upon the ground that it fails to disclose a cause of action or a defense or that point, or any other point of law (other than a question of pleading or practice) may be raised in the answer and disposed of either at the trial or in the court's discretion before trial, on motion.

The answer must specifically deny such allegations of fact as the defendant intends to dispute, and must state any defense which if not stated "would be likely to cause surprise, or would raise an issue not arising out of the complaint." Payment, performance and contributory negligence are instances, given in the rule, of such defenses. The general denial is allowed only when the defendant "in good faith" intends to controvert all the allegations of the complaint. A good deal of trouble and expense could be avoided by confining this defense to such cases; but thus far, it appears that not much heed is given to this rule and the general denial is often used for the purpose of compelling plaintiff to prove his whole case, though the controversy arises upon a denial of some part only of the facts which he alleges. But the general denial is never used in practice so far as I know without a special statement of the real defense. If the general denial is used, without reasonable cause, the defendant makes himself liable to pay the plaintiff's expense in proving the facts so denied, and, moreover, any party may demand in writing that his opponent admit any specific fact rel-

evant to the issues, and in case of refusal the expense of proving the fact must be paid by the party refusing to admit it, unless the trial judge shall certify that the refusal was reasonable.

Writs of Error.

These are abolished in civil cases and an appeal, taken upon written notice, is substituted. The grounds of appeal must be stated either in the notice or on a separate paper. The appeal is a "step in the cause and is deemed to remove to the appellate court the entire record of the cause." Upon the appeal the appellate tribunal may, in its discretion, take additional evidence, provided the fact to be proved is "capable of proof by record or other uncontrovertible evidence, defective certification, or failure to lay the proper foundation for evidence which can, in fact, without involving some question for a jury, be shown to be competent."

When a new trial is ordered solely on the ground that damages are excessive or inadequate, the verdict is set aside upon that point only; and so, if the verdict is wrong upon any other point which is separable, a new trial may be ordered upon that point, leaving the verdict stand in other respects.

The new procedure has now been in effect something more than three years, and there seems to be no doubt that it gives general satisfaction. Some criticisms are heard, chiefly directed against the crude pleadings which are filed in many cases; but no one capable of drawing a special count, or special plea, under the old practice, should have difficulty in drawing a good complaint or answer under the new system. Some of those who opposed the change have since expressed their approval of it, or, at least, their disapproval of a return to the old procedure.

The act and the rules are founded upon the English Rules of Court under the Judicature Act of 1873. The Connecticut Practice Act of 1879 was also used in part, as a model; but the New Jersey procedure contains some important provisions not found in either of those systems. Of course, the history of the movement for simplified procedure goes back much further than 1873. It was, in fact, one aspect of the great reform movement which

worked throughout the English-speaking world during the Nineteenth Century. The successive steps following Jeremy Bentham's writings were, the English statutes under which the Hilary Rules were made in 1834, the Field (New York) Code of 1848, the English Common Law Procedure Acts of 1852 and 1854, and the Judicature Act and Rules of 1873.

The New Jersey Practice Act was prepared by a Committee of the State Bar Association, appointed under a resolution of the Association adopted at its annual meeting in June, 1911. Upon the Committee were two justices of the Supreme Court, two vice chancellors, two ex-justices of the Supreme Court, two ex-judges of Courts of Common Pleas and several prominent lawyers.

The year books of the Association for the years 1911-12, and subsequent years, report the successive steps taken by the Committee in securing the adoption of this act and of the act of 1915, relating to chancery procedure.

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